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No. 06-906

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In The
Supreme Court of the United States

CARLOS PRADILLA,

Petitioner,

v.

ALBERTO GONZALES, Attorney General of the United States; MICHAEL CHERTOFF, Secretary, United States Department of Homeland Security,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR THE PETITIONER

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REASONS FOR GRANTING THE PETITION

I. As An Initial Matter, This Petition Does Not Involve Review Of The Magistrate Judge's Report And Recommendation Nor The District Judge's Order, But Solely The Decisions Of The Eleventh Circuit, Board Of Immigration Appeals ("BIA"), And To The Extent Ratified By The BIA, The Decision Of The Immigration Judge ("IJ").

In the Eleventh Circuit's decision in this case, all but two sentences dealt with the procedural posture of this case. *See* App. 1-4. No substantive analysis was provided. As the Circuit panel properly held, the REAL ID Act, Pub.L. No. 109-13, 119 Stat. 311 (2005), converted the Petitioner's habeas claim into a petition for review. *Id.* The decision of the United States District Court (App. 8-9) and the Report and Recommendation of the Magistrate Judge (App. 10-40), therefore, have *no legal effect* and must be wholly disregarded; *the Eleventh Circuit only stood in review of the decision of the BIA. See Hernandez v. Gonzalez*, 437 F.3d 341, 344 (3d Cir. 2006) ("[W]e are obliged to vacate the District Court's opinion and address the claims raised ... as if ... presented before us in the first instance as a petition for review"); *see also Ramirez-Molina v. Ziglar*, 436 F.3d 508, 511-12 (5th Cir. 2006). To the extent that the BIA relied on the decision of the Immigration Judge (IJ), then the decision of the IJ would also be relevant.[1]

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[1] The Circuit Court of Appeals typically stands in review of the BIA's decision, since it is the highest administrative tribunal. *Al Najjar v. Ashcroft*, 257 F.3d 1262, 1284 (11th Cir. 2001). However, when the BIA expressly adopts the Immigration Judge's opinion and reasoning, the courts review the Immigration Judge's decision, not the BIA's. *Savoury v. U.S.Att'y Gen.*, 2006 WL 1426950 (11th Cir. 2006); *Al Najjar*, 257 F.3d at 1284; *D-Muhumed v. U.S. Att'y Gen.*, 388 F.3d 814, 817-18 (11th Cir. 2004). To the degree that the BIA adopts the Immigration Judge's decision, the BIA "must be charged with whatever flaws or inadequacies" that the reviewing court discerns. *Angoucheva v. INS*, 106 F.3d 781, 789 (7th Cir. 1997). The BIA may expressly adopt the Immigration Judge's opinion by issuing an affirmance without opinion, or by issuing a brief *per curiam* opinion. *See Gandarillas-Zambrana v. BIA*, 44 F.3d 1251, 1255 (4th Cir. 1995); *Panrit v. INS*, 19 F.3d 544, 546 (10th Cir. 1994).

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The Solicitor General's Brief for the Respondents in Opposition ("Resp.") concedes these points at pp. 17-18, but nonetheless proceeds to make *seven* (7) *references* to the United States Magistrate Judge's decision in the course of an eleven-page argument, in an attempt to shore up weak legal and factual foundations, as noted in the various instances discussed below. *See* Resp. at 12-14, 17.

II. Under This Court's Precedents, The Use Of The Categorical And Modified Categorical Approach Is *Required* In Determining The Legal Effect Of A Conviction For Immigration Purposes.

A. The government's response argues that the use of the categorical and modified categorical approaches was not required in the instant case. The government contends that "there is reason to question whether [the] categorical approach [set forth in *Taylor v. United States*, 495 U.S. 575 (1990)] must be applied, at least in the same way, in the deportation context," given that *Taylor* was a criminal case. *See* Resp., at 10-11. This ignores the controlling Supreme Court precedent in *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (using the categorical approach to assess whether a conviction was a "crime of violence" for immigration-law purposes) and *Gonzalez v. Duenas-Alvarez*, 127 S.Ct. 815, 818-19 (2007) (using the categorical approach to assess whether a conviction for aiding and abetting theft was a "theft" crime for immigration-law purposes, and confirming the validity of the modified categorical approach as well); *Lopez v. Gonzales*, 127 S.Ct. 625 (2006). The government's response cites no Supreme Court decisions and/or dicta that would suggest

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In the instant case, the BIA issued its own opinion, but on the critical question herein – whether the Petitioner's offense related to a controlled substance – the BIA's total treatment amounted to three sentences. The first sentence raised the issue, the second confirmed the BIA's agreement with the Immigration Judge ***without any explanation whatsoever***, and the third cited the fifty-year-old case that the Judge had relied upon. App. 6-7. On these facts, this Court must look to the Immigration Judge's decision as supplying the reasoning behind the BIA's decision.

that the categorical and modified categorical approaches do not apply in immigration cases or are differently applied in those cases as opposed to criminal ones.

B. The government further argues that the two approaches need not have been used in the instant case because, as a procedural matter, the question decided by the BIA was the Petitioner's eligibility for relief from removal, as opposed to the grounds of removability itself. *See* Resp., at 11, 19; Pet. Brief, at 5-6 n.3. That is, the government argues that the categorical and modified categorical approaches must be used by the Immigration Court in determining whether a conviction "relates to a controlled substance" if the conviction is the basis for removal, but not on the *same question* if the conviction is the basis for denying the alien the right to seek relief from removal.

This is a distinction without a difference. The policy reasons for utilizing the categorical and modified categorical approaches, summarized in Petitioner's Brief, at 11-12, are no less compelling if the question (of whether a conviction relates to a controlled substance) arises at one stage of the immigration proceedings versus another. The policy aims – precluding the immigration court from retrying the criminal case, grappling with what type of evidence to admit, arriving at results inconsistent with other courts, *Shephard v. United States*, 544 U.S. 13, 19-20 (2005); *Taylor*, 495 U.S. at 601-02 – are just as strong when the immigration judge decides whether the given offense renders the alien removable or ineligible for relief from removal.[2] *See also I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 104

[2] The government's logic could lead to absurd results. For instance, assume that the Department of Homeland Security (the "DHS") had not dismissed the charge against the Petitioner that he was removable for having committed a crime relating to a controlled substance. The immigration court would have used the categorical and modified categorical approaches to assess whether that charge was valid, and as shown in Petitioner's Initial Brief, could only have arrived at the conclusion that the conviction was *not* a crime relating to a controlled substance. But the Petitioner would still have been removable as an overstay, and would have sought to adjust his status. The same question as before – was his offense related to a controlled substance – would thus arise again. According to the government, the immigration court would *not* have to apply the categorical and modified categorical approach at this point, in determining eligibility for relief, though

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S.Ct. 3479 (1984) (stating that, "[a] deportation proceeding is a purely civil action to determine eligibility to remain in this country. . . . The judge's sole power is to order deportation; the judge cannot adjudicate guilt or punish the respondent for any crime. . . ."). The Respondent's brief fails to devote a single word to the policy reasons underlying the categorical and modified categorical approaches, because these reasons run contrary to its arguments and to the decisions below under review in the instant case.[3]

III. The Solicitor's Contention That The Eleventh Circuit Followed The Categorical Or Modified Categorical Approach Because It Reviewed Certain Documents Improperly Describes The Approach

A. The Modified Categorical Approach Is Not Only A Review Of Documents But A Limitation On The Documents Which The Immigration Court May Examine, And The Eleventh Circuit Necessarily Strayed Beyond Those Limits In Upholding The IJ/BIA's Decision

It is beyond doubt that in applying the modified categorical approach, the list of documents set forth in *Shephard*, 544

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the question is exactly the same. The immigration court could look at the underlying facts, forcing the parties to relitigate the criminal matter virtually in full. While in this case the results would presumably be the same, it is easy to envision cases in which facts outside the record would lead to a different result if the categorical and modified categorical approaches were not used.

[3] The government argues, in effect, that the categorical approach applies only to determine grounds of removability and does not apply with respect to determine grounds of inadmissibility regarding an aliens' eligibility for waivers. Resp. at 18-19. In fact, the BIA has clearly held in numerous cases that the categorical approach applies in all cases to determine whether a crime, for example, can be classified as an aggravated felony, *Matter of Sweetser*, 22 I&N Dec. 709 (BIA 1999), as a crime involving moral turpitude, *Matter of Short*, 20 I&N Dec. 136 (BIA 1989), a firearms conviction, *Matter of Teixeira*, 21 I&N Dec. 316 (BIA 1996), or a controlled substance offense, *Matter of Mena*, 17 I&N Dec. 38 (BIA 1979). There is no authority for the proposition, as Respondent urges that the categorical approach is inapplicable to determine grounds of inadmissibility for purposes of determining an alien's eligibility for a waiver.

U.S. at 26, and its progeny is an ***exclusive*** list – i.e., not a mere starting point for the Immigration Court's inquiry. *See also Gonzalez v. Duenas-Alvarez*, 127 S.Ct. 815, 819 (2007); *Medina v. Ashcroft*, 393 F.3d 1063, 1066-67 (9th Cir. 2005); *Chang v. INS*, 307 F.3d 1185, 1189-90, 1191-92 (9th Cir. 2002) (reversing because the Immigration Court relied on the presentence report, even though it conflicted with the permitted documents); *United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002) (en banc) (also reversing because of the Immigration Court's reliance on information in the presentence report whose source was unclear). The court may only examine the charging document, plea agreement, the transcript of the plea colloquy, or "some comparable judicial record" of information about the "factual basis for the plea," but nothing beyond such documents. *Shephard*, 544 U.S. at 26.

It is also beyond doubt that such documents are only relevant with respect to the crime(s) for which the alien was *convicted*. Time and again, the circuit courts of appeals have emphasized that in determining whether a conviction fits a given immigration law category and therefore justifies removal, ***the court may look only at convictions, and not to charges which were dismissed.*** *See, e.g., Alaka v. U.S. Attorney General*, 456 F.3d 88, 106-09 (3rd Cir. 2006) (holding that the Immigration Court erred in relying upon dismissed charges in determining that the alien's fraud offense caused more than $10,000 in losses, or that it was a "serious offense"; regarding the former, the plea agreement controls, not the indictment); *Chang*, 307 F.3d at 1190-91 (similarly holding that the Immigration Court erred in relying upon dismissed charges in determining that the alien's fraud offense caused more than $10,000 in losses; the INA requirements of a conviction and losses over $10,000 could not be separated from each other, such that the latter could be proved by dismissed counts); *Yousefi v. I.N.S.*, 260 F.3d 318, 329-30 (4th Cir. 2001) (reversing the Immigration Court and stating that, "[w]e can find no authority for the proposition that dismissed counts . . . may be considered in determining whether a specific crime is a particularly serious one"); *Conteh v. Gonzales*, 461 F.3d 45, 56 (1st Cir. 2006) (stating that "the BIA . . . must base removal orders on *convictions*, not on conduct alone").

B. The IJ Did Not Follow The Modified Categorical Approach

In short, if an immigration judge looks beyond the convictions to information regarding ***dismissed*** counts, then that is a misapplication of the categorical and modified categorical approaches. That is precisely what occurred in the instant case. The court below misapplied the modified categorical approach, in that it based its conclusion on a count on which the Petitioner was never convicted. The immigration judge explicitly pointed to "Count Three of the Indictment" – in which the Petitioner was charged with conspiracy to possess narcotics – as proving that his conviction on Count One related to a controlled substance, but the judge himself recognized that the Petitioner was never convicted of Count Three. *See* Petitioner's Brief, at 6; App. 54-56.

Respondent asks this Court to ***reinvent*** the Immigration Judge's (IJ's) order and to assume that when the IJ wrote, "Count Three," the court below really meant, "part three of Count One." *See* Resp., at 13-14. As Respondent itself noted in its brief, the Court's "review of the agency's decision is limited to the evidence in the administrative record, 8 U.S.C. § 1252(b)(4)(A)." Resp., at 12. As such, this Court reviews the record (including the immigration judge's opinion) ***as written***, not as the government ***wishes*** it were written: i.e., "count Three" must mean Count Three and not some other count. To hold otherwise would be to rewrite opinions based on their inferences and guesses as to what was purportedly intended by the courts below in contravention of the clear language utilized. *See, e.g., Bruner v. U.S.*, 343 U.S. 112, 116 (1952) ("[W]e may not speculate on probabilities of intention" in the context of statutory interpretation) (internal quotes omitted); *U.S. Postal Service v. Gregory*, 534 U.S. 1, 7 (2001) ("It is not for the Federal Circuit to substitute its own judgment for that of the Board").

Moreover, the government pushes for this suggestion based on how the immigration judge described the relevant count that he was taking into consideration. Respondent neglects to mention that the judge described the relevant count in different ways at different times. At one point, the court states that the Petitioner was "charged with, but not specifically convicted of,

violations involving the transportation of narcotic drugs into the United States." App. 55. This is not a precise reference to either Count Three (conspiracy to possess cocaine with the intent to distribute) or part three of Count One (conspiracy to travel in interstate commerce with the intent to distribute the proceeds of unlawful narcotic sales), but surely more closely resembles the former, in that it deals with obtaining drugs, not distributing the financial proceeds thereof.[4]

IV. The "Reason To Believe" Ground Of Inadmissibility Was Never Reached By The BIA (Nor By The Eleventh Circuit Below), And, Therefore, Is Not Properly Before This Court

The government in response alternatively maintains that Mr. Pradilla was ineligible for the waiver of his criminal conviction under 8 U.S.C. § 1182(h) because there was a "reason to believe" he was an "illicit trafficker in [a] controlled substance" or co-conspirator of an "illicit trafficker." *See* Resp., at 17 (citing 8 U.S.C. § 1182(a)(2)(C)(i)). The government then admits, however, that the BIA never even reached this issue, but that "the magistrate judge did ... and the district court adopted his recommendation." *Id.*

The government, after admitting that the BIA (and by extension the Eleventh Circuit) never reached this issue, impermissibly has relied on the Magistrate Judge's report and District Court's decision to find that they "came to the same

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[4] In fact, regardless of whether the Immigration Judge meant Count Three or part three of Count One, the record shows that the Petitioner was not convicted of either. The judgment clearly indicates that Count Three was dismissed. As to Count One, the Petitioner was convicted of *part one* of that count (knowingly causing a financial institution to fail to file a currency transaction report for a deposit over $10,000), *not part three of that count*. *See* Plea Colloquy Transcript, quoted in Petitioner's Initial Brief at 19-20; *see also* the Indictment, District Court Docket Entry 5, at 7-19 (where the Petitioner is only listed in two of the 93 "Overt Acts" and his two acts only mention currency, whereas many of the acts mentioning other persons specifically referenced narcotics). Nothing in the documents permitted for review under the modified categorical approach prove or even suggest that the Petitioner's crime was, to his knowledge, related to a controlled substance.

conclusion as the IJ." *Id.* As mentioned, the Magistrate Judge's report and District Judge's decision have *no legal effect* and must be wholly disregarded as the *Eleventh Circuit only stood in review of the decision of the BIA*. Since the BIA did *not* consider the "reason to believe" ground of inadmissibility, as conceded by the Government, *id.* at 17, it is not a proper issue before this Court.

V. There Is A Split In The Circuits As Shown By The Lower Courts' Application Of (And Failure To Apply) The Categorical And Modified Categorical Approach

A. The Cases Relied Upon By Respondent Are In No Way Indicative Of A Two-Step Approach

The split in the circuits is clear: while some circuits simply apply a nexus test, others apply the categorical or modified categorical approach. Respondent's reading of the cases discussed in Petitioner's initial brief ignores the fact that the First Circuit, Fifth Circuit, as well as Sixth Circuit, is in direct conflict with the Ninth Circuit in its application of the categorical approach. *See* Pet. Brief, at 12-23. *Compare Urena-Ramirez v. Ashcroft*, 341 F.3d 51 (1st Cir. 2003), *Peters v. Ashcroft*, 383 F.3d 302 (5th Cir. 2004), and *Castaneda v. INS*, 557 F.2d 79 (6th Cir. 1977), with *Chang v. INS*, 307 F.3d 1185, 1189-92 (9th Cir. 2002).[5]

From a close reading of the cases cited by Respondent, *see* Resp., at 16-17, it is apparent that, despite the government's assertion to the contrary, these courts did *not* engage in a two-step approach, i.e., first applying the categorical approach and then a nexus test. There is no question that no mention is made in these cases of *Taylor*, the categorical approach, or

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[5] Petitioner has not confused "apples and oranges" because while the First, Fifth, and Sixth Circuits employ a "nexus" test, other circuits employ some version of the categorical or modified categorical approach under *Taylor* to determine whether a criminal conviction is "related to a controlled substance" offense.

even the modified categorical approach.[6] Instead, only some version of a nexus test was applied. In *Peters*, for example, the Fifth Circuit explicitly voiced its disagreement with the approach used by the Ninth Circuit: "We disagree with the Ninth Circuit's conclusion [in *Londono-Gomez v. INS*, 699 F.2d 475 (9th Cir. 1983)] that no such nexus can be found in an Arizona solicitation conviction." *Peters*, 383 F.3d at 307. Clearly, the Fifth Circuit has expressed discord with the Ninth Circuit in terms of the exact type of test to be applied in determining the very issue before this Court: whether a given conviction can be considered "related to a controlled substance" under the immigration laws.

Similarly, in *Urena-Ramirez*, *see* Resp. at 16, there was no mention of the categorical approach, and absolutely no mention that the IJ was limited in what documents it could review under *Taylor*. Rather, the court simply noted that the IJ relied on "the record of the petitioner's conviction, including the plea agreement" and found that the petitioner's Travel Act conviction "constituted both a drug-related offense and an aggravated felony." *Urena-Ramirez*, 341 F.3d at 53. No further mention was made of what documents the IJ or BIA could or did examine.

Respondent, therefore, incorrectly describes *Peters*, *Urena-Ramirez*, as well as, *Johnson v. INS*, 971 F.2d 340 (1992), as employing a "two-step approach," ***when no such approach was employed.*** A glaring example of Respondent's misapprehension is *Johnson*, where the court expressly noted in the course of its decision that it had utilized the alien's "Petition to Enter a Plea of Guilty," which was ***not*** one of the documents allowed under the categorical approach as formulated in *Taylor* and *Shephard*. *See Johnson*, 971 F.2d at 343 (noting that in the Petition to Enter Plea of Guilty, Johnson stated: "*I believed* that my boyfriend was going to use [a hidden compartment in a car] to put money in it from narcotics."). Such use of a document ***outside the record of conviction*** is expressly not allowed

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[6] Indeed, there is no way to tell, in the cases cited by Respondent, *see, e.g.*, *Peters* and *Urena-Ramirez*, whether the IJ or BIA below went outside the record of conviction and looked at impermissible facts in contravention of *Taylor*, since *Taylor* was not applied.

under the categorical or modified categorical approach. *See Taylor*, 495 U.S. at 602 (holding that sentencing court may look "only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions.").

There is no question that the controlling Supreme Court precedents, in *Leocal*, *Lopez*, *Shephard*, and *Taylor*, do ***not*** allow for the lower courts to transform the "categorical" approach into a simple "nexus" test. Nor was it proper for the Eleventh Circuit in the present case to affirm the rulings of the BIA and IJ, which were in contravention of *Taylor* and this Court's other precedent decisions.[7]

CONCLUSION

For the reasons stated in the original Petition and this Reply, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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[7] Respondent finally argues, *see* Resp. at 17, *that even if there were a circuit conflict*, the present case is not an appropriate one "for resolving it" because, according to Respondent, "there is no reason to believe that the court below applied a standard other than the one the petitioner advocates." *Id. However, this is simply not the case.* There is every reason to believe the Eleventh Circuit failed to apply the categorical approach below because to find that Mr. Pradilla was convicted of a crime relating to a controlled substance, the court necessarily had to go outside the record of conviction and consider counts for which he was not convicted. The Petitioner was only convicted of a money laundering offense, Count I (knowingly causing a financial institution to fail to file a currency transaction report for a deposit over $10,000), and there was no offense for which he was actually convicted that contained any reference to a controlled substance.